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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by extending *Francis v. Franklin*, 471 U.S. 307 (1985) to a case involving proper intent instructions and no instructional link between the instructions on specific intent for first degree murder and the alleged *Sandstrom* error, a single instruction accurately stating pursuant to California statute that Respondent was to be presumed sane at the guilt phase of his trial.

2. Whether this Court should exercise its supervisory power to correct the Ninth Circuit's failure to notify the parties that it had augmented the appellate record with a partial transcript which was then used to support its rationale for reversal despite language in the augmented transcript which indicated that further augmentation would undermine the rationale for reversal.

3. Whether this Court should resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v. Franklin*, 471 U.S. 307 (1985).

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

No. _____

JAMES H. GOMEZ, *Petitioner*,

v.

MITCHELL ALFRED PATTERSON, *Respondent*.

OPINION BELOW[1/]

Petitioner respectfully petitions for a writ of certiorari to review the August 16, 2000, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Patterson v. Gomez*, 223 F.3d 959, (9th Cir. 2000) (No.99-15530) (hereafter "*Patterson*") (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California that denied Respondent's habeas corpus petition. Respondent is a prisoner in state custody pursuant to a judgment of conviction for first degree murder in the Superior Court of the State of California.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Patterson*; (B) the Ninth Circuit's September 11, 2000, order granting Petitioner's motion for stay of mandate; (C) United States District Court Judge David F. Levi's February 25,

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

1999, order denying a certificate of appealability on Respondent's claim of insufficient evidence and granting a certificate of appealability on Respondent's claim that due process was violated by the trial court's instruction that defendant was presumed to be sane; (D) United States District Court Judge David F. Levi's December 17, 1998, order adopting the Findings and Recommendations of the magistrate judge in full and denying Respondent's application for writ of habeas corpus; (E) United States Magistrate Judge Gregory G. Hollows' May 22, 1998, Findings and Recommendations that the application for writ of habeas corpus be denied; (F) the California Supreme Court's February 14, 1996, denial of Respondent's petition for review; and (G) the November 6, 1995, opinion of the Court of Appeal of the State of California, Third Appellate District.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, Petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on August 16, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Because of the length of the relevant constitutional provisions and statutes, their pertinent text is set out in Appendix (H). These authorities include: the Fourteenth Amendment to the United States Constitution; 28 U.S.C. sections 1254(1), 2253(a), 2254(a), 2254(d)(1), 2254(e)(1);

and California Penal Code sections 187, subdivision (a), 1026, subdivision (a), and 1192.7, subdivision (c)(1).

STATEMENT OF THE CASE

On March 31, 1993, Respondent killed his 10-year-old daughter, Adrianna, by carrying her onto Interstate 80 and throwing her into the path of a large semi truck.

On June 3, 1993, an information was filed in Nevada County Superior Court case number 49140, charging Respondent Mitchell Alfred Patterson with a single count of violating California Penal Code section 187, subdivision (a), murder in the first degree.[2/] It was further alleged that the murder was a serious felony within the meaning of section 1192.7, subdivision (c)(1).

On June 23, 1993, Respondent entered pleas of not guilty and not guilty by reason of insanity. Consequently, Respondent's trial was bifurcated into a guilt phase and a sanity phase pursuant to section 1026.

On November 17, 1993, Respondent's trial began. The next day, jury panelists were provided with jury questionnaires and instructed to fill them out and return them to the Clerk.[3/] Jury questionnaire question number 58 asked that the prospective jurors answer yes or no to two specific questions pertinent to the instant petition. Specifically, after informing the prospective jurors in question number 58 that "[i]nsanity, as referred to in this case, is a legal term not a medical term," each prospective juror was asked "Do you agree a person can be mentally ill and under the law not insane?" and "Do you have a problem

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2. All further statutory references are to the California Penal Code unless otherwise indicated.

3. A blank copy of the jury questionnaire filled out by the jurors in this case is attached as Appendix I.

with that aspect of the law?"[4/] (Appendix I at 9-10.) Voir dire commenced on November 18, 1993, and continued through November 19, 1993, when the court instructed the jury as to the nature and procedure of the trial. (Appendix J.) On December 2, 1993, the presentation of evidence began in the guilt phase of Respondent's bifurcated jury trial. On January 27, 1994, at the conclusion of the guilt phase, the jury found Respondent guilty of first degree murder.

In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial of the sanity phase, a second jury found Respondent legally sane at the time he committed the crime of murder in the first degree.

On July 29, 1994, the court denied probation and sentenced Respondent to a term of 25 years to life in state prison.

On November 6, 1995, the Court of Appeal of the State of California, Third Appellate District, affirmed Respondent's conviction. (Appendix G.) In so doing, the court found that *Francis v. Franklin*, 471 U.S. 307 (1985) (hereafter "*Francis*") was "inapposite" because the trial court in Respondent's case "expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed 'the mental state or specific intent' necessary for murder." (Appendix G at 9, fn.2.) The Third Appellate District found that it was "undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase" and that "trial counsel did not take issue with the challenged instruction." (Appendix G at 10.)

4/ Question number 58 was preceded and followed by a series of questions which included questions concerning the use of circumstantial evidence as a means of proving specific intent or mental state, and questions pertaining to psychiatry, psychology, psychiatric testimony and mental illness. (Appendix I at 7-11.)

On February 14, 1996, the California Supreme Court denied Respondent's petition for review. (Appendix F.)

On August 28, 1996, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento), raising two grounds for relief: (1) that his due process rights under the Fourteenth Amendment were violated when the trial court instructed the jury during the guilt phase that he was presumed to be sane, thereby relieving the prosecution of the burden of proving premeditation and deliberation, and nullifying defense evidence that he had a severe mental disorder; and (2) that there was insufficient evidence of premeditation and deliberation. The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On May 22, 1998, the magistrate judge filed his Findings and Recommendations ("F&Rs"), recommending denial of the application for writ of habeas corpus. (Appendix E.)

On December 17, 1998, United States District Court Judge David F. Levi adopted the F&Rs in full, denied the application for writ of habeas corpus and dismissed the case. (Appendix D.) In so doing the district court found that the key distinction between the instant case and *Francis*,

> is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, *id.* at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. . . . [T]he jury herein was only instructed that [Respondent's] sanity was presumed--there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

(Appendix E at 10.) Consequently, the district court concluded that Respondent failed "to show that the state

court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments." (Appendix E at 9.)

On December 23, 1998, Respondent filed a timely notice of appeal in the Ninth Circuit, and on February 25, 1999, the district court granted a certificate of appealability limited to Respondent's "claim that due process was violated by the trial court's instruction that defendant was presumed to be sane." The district court denied a certificate of appealability on Respondent's claim of insufficient evidence. (Appendix C.) The Ninth Circuit's jurisdiction was conferred by 28 U.S.C. § 2253.

On August 16, 2000, the Ninth Circuit issued its published opinion in *Patterson* reversing and remanding "the case to the district court with instructions to grant the writ, unless the State of California grants Patterson a new trial within a reasonable period to be set by the district court." (Appendix A at 22.) Relying on *Francis*, the Ninth Circuit held "that the guilt phase instruction to presume the defendant was sane was a violation of the Due Process Clause of the Fourteenth Amendment" and that "[t]he California Court of Appeal's decision that there was no error was, in the words of AEDPA, 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. § 2254(d)(1)."[5/] (Appendix A at 18-19.) Immediately prior to this holding, the Ninth Circuit quoted an instruction given by the trial judge at the beginning of the trial (Appendix A at 18) and then stressed that:

> Nowhere in his preliminary or concluding instructions did the judge explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the

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5. The Ninth Circuit further held that the error was not harmless. (Appendix A at 22.)

> *M'Naghten* definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind.

(Appendix A at 18.)

On or about August 23, 2000, after unsuccessfully searching the voluminous appellate record for a transcript which might contain the preliminary instruction quoted by the Ninth Circuit, and after contacting both the prosecutor and counsel for Respondent to inquire whether their copies of the appellate record contained a reporter's transcript with the preliminary instruction, counsel for Petitioner contacted Stephen Seferian of the Ninth Circuit's Clerk's Office by telephone to request that the Ninth Circuit provide counsel with a citation to the page(s) of the appellate record from which the preliminary instruction was quoted. Mr. Seferian informed counsel that he would contact chambers about the request. On August 25, 2000, after counsel for Petitioner was informed by telephone by Mr. Seferian that the request for record citation would have to be made in writing to the court, Petitioner prepared and served a written Request for Record Citation. (Appendix K.)

On September 11, 2000, counsel for Petitioner received a letter dated September 7, 2000, from Ninth Circuit Court Executive/Clerk of Court Cathy A. Catterson informing counsel that "[t]he Court ordered additional portions of the transcript at its own expense." Attached to the September 7, 2000, letter was a copy of the original transcript ordered by the Ninth Circuit. (Appendix L.) On page six of that transcript, the phrase "as you heard" had been underlined by hand. (Appendix L at 7.) Counsel for Petitioner subsequently determined that the Ninth Circuit had requested the partial transcript from Nevada County court reporter Penny Gordon on or about December 22, 1999, and that the phrase "as you heard" on page six of the transcript

had not been underlined by the court reporter. (Appendix M at 8.)

On September 11, 2000, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Appendix B.)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three separate reasons. First, certiorari should be granted to preclude the Ninth Circuit's extension of this Court's decision in *Francis v. Franklin* to cases where the jury has been properly instructed on mens rea issues and where no instructional link exists between the instructions concerning specific intent and the alleged *Sandstrom*[6] error (which in this case was a single instruction accurately stating pursuant to California statute that Respondent was to be presumed sane at the guilt phase of his trial). Second, this Court should exercise its supervisory power over the federal judiciary to protect judicial integrity and ensure that the law is enforced by fair proceedings, *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 736, fn. 8 (1980); *Rosenberg v. United States*, 346 U.S. 273, 287 (1953), by correcting the Ninth Circuit's failure in *Patterson* to timely notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which indicated that further augmentation would undermine the rationale for reversal. Third, certiorari should be granted to enable this Court to resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v.*

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6. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Franklin, 471 U.S. 307 (1985), thereby avoiding a gross miscarriage of justice in this and future cases.

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;
> >
> > . . .
> >
> > (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> . . . .

In the present case, certiorari should be granted for the three reasons noted above. Not only has the Ninth Circuit improperly extended this Court's *Francis* decision to

cases where the jury has been properly instructed on mens rea issues and where no instructional link exists between the instructions concerning specific intent and the alleged *Sandstrom* error, but the Ninth Circuit's opinion in *Patterson* "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

In his *Francis* dissent (joined by Justice O'Connor and former Chief Justice Burger), Chief Justice Rehnquist stressed that the majority's approach to the charge in *Francis* was "more like that of a zealous lawyer bent on attaining a particular result than that of the 'reasonable juror' referred to in *Sandstrom*." 471 U.S. at 332. Petitioner submits that the Ninth Circuit's approach to the charge in *Patterson* was worse than that of a zealous lawyer bent on attaining a particular result because it improperly attained its desired result by failing to timely notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which strongly suggested that further augmentation would undermine the rationale for reversal. In short, the Ninth Circuit transformed a non-issue (the undisputed state court finding that the trial court had correctly advised the jurors that the case would be tried in two parts, a guilt phase and a sanity phase) into the foundation for its decision to reverse the judgment by selectively augmenting the record without notice to the parties and by disregarding language which would have caused anyone other than a "zealous lawyer bent on attaining a particular result" to have taken pause concerning the validity of the argument supporting the *Patterson* opinion.

This Court also should grant certiorari to resolve the conflict between the majority opinions in *Cupp v. Naughten* and *Francis v. Franklin*. As will be set forth in greater detail in Argument III, *infra*, Chief Justice

Rehnquist, the author of the majority opinion in *Cupp*, emphasized in his *Francis* dissent that the reasoning of the majority opinion in *Francis* "cannot be squared with *Cupp*, in which this Court emphasized that 'the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.'" 471 U.S. at 341, emphasis added.

The present case provides the perfect vehicle to resolve this conflict because the *Patterson* opinion (relying on a portion of the majority opinion in *Francis* that in turn cites *Cupp*) declined to consider the words actually spoken to the jury during the extensive questioning and preliminary instructions of the voir dire portion of the trial. In so doing, the *Patterson* opinion has ignored the language spoken to the jury which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at 5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) By granting certiorari to resolve the conflict between *Cupp* and *Francis*, this Court will be able to reverse the dangerous precedent set by the *Patterson* opinion, thereby preventing a gross miscarriage of justice in this and future cases.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED BY EXTENDING *FRANCIS* TO THE PRESENT CASE WHERE THE JURY WAS PROPERLY INSTRUCTED ON MENS REA ISSUES AND WHERE THERE WAS NO INSTRUCTIONAL LINK BETWEEN THE INSTRUCTIONS CONCERNING SPECIFIC INTENT FOR FIRST DEGREE MURDER AND THE ALLEGED *SANDSTROM* ERROR, A SINGLE INSTRUCTION ACCURATELY STATING PURSUANT TO CALIFORNIA STATUTE THAT RESPONDENT WAS TO BE PRESUMED SANE AT THE GUILT PHASE OF HIS TRIAL

Relying on *Francis v. Franklin*, 471 U.S. 307 (1985), the Ninth Circuit held in *Patterson* that a jury instruction which requires a jury to presume that a defendant is sane at the guilt phase of a murder trial, without providing the legal definition of sanity,[7] violates the Due Process

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7. The challenged instruction reads as follows: "At the time of the alleged offense charged in the information, you are instructed to presume the defendant was sane." AEOR 34; RT 1670. The instruction was taken from section 1026, which provides in pertinent part:

> (a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

Clause of the Fourteenth Amendment and is not harmless error.

In *Francis*, the jury was instructed that the fact of a sound mind gave rise to a presumption *on the intent issue* as follows:

> (1) "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and (2) "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted."

471 U.S. at 309. *Francis* held that these instructions violated the Due Process Clause by "creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent." 471 U.S. at 325.

A. The Ninth Circuit Improperly Extended *Francis* To Cases Where The Jury Has Been Properly Instructed On Mens Rea Issues And Where No Instructional Link Exists Between The Instructions Concerning Specific Intent And The Alleged *Sandstrom* Error

Certiorari should be granted to correct the Ninth Circuit's improper extension of *Francis*. As stated by the state appellate court, *Francis* was "inapposite" because "the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed 'the mental state or specific intent' necessary for murder."[8] As explained by the Honorable

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8. Immediately preceding the challenged instruction, the trial court

David F. Levi and Magistrate Judge Hollows, the key distinction between the instant case and *Francis*,

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instructed the jury as follows:

> Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state *or specific intent* which is an element of the crime charged in the information, and are found in the definitions of murder.
>
> If from all of the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent.

AEOR 33, italics added; RT 1669-1670; SEOR 3-4. (The italicized portion of the above instruction was included in the written jury instructions given to the jury but was omitted when the judge read the instructions to the jury.) Furthermore, as noted in the magistrate judge's F&Rs,

> the trial court immediately followed these instructions with the definitions of murder and the intent level that must be proved, including malice aforethought and willful deliberation and premeditation. See RT 1670-72. The court also described the different degrees of homicide and instructed that in order to find first degree murder, the jury must find that malice aforethought and deliberation and premeditation were proved beyond a reasonable doubt. RT 1670, 1672, 1674. The court additionally instructed the jury that petitioner was presumed innocent until proven guilty beyond a reasonable doubt by the People who had the burden of proof. RT 1668.

Appendix E at 8-9; AEOR 25-26; see SEOR 2-8. The aforementioned instructions as well as the pertinent instructions on circumstantial evidence are set forth in Appendix N.

> is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, *id.* at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. . . . [T]he jury herein was only instructed that [Respondent's] sanity was presumed--there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

(Appendices D and E at 10.) Consequently, the district court concluded that Respondent failed "to show that the state court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments." (Appendix E at 9.)

Petitioner submits that the federal district court and the state courts were correct in determining that there was no *Francis/Sandstrom* error in the present case. Employing the words of Chief Justice Rehnquist's *Francis* dissent, Petitioner submits that the *Patterson* "decision needlessly extends" this Court's "holding in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), to cases where the jury was not required to presume conclusively an element of a crime under state law." 471 U.S. at 332. As Chief Justice Rehnquist explained in his majority opinion in *Cupp*,

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

414 U.S. at 146. The Ninth Circuit erred by holding that the challenged instruction in this case violated the Due

Process Clause of the Fourteenth Amendment and is not harmless error.[9/]

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9. As stated above, Petitioner submits that there was no *Francis/Sandstrom* error in the present case. Assuming arguendo that the challenged instruction was improperly given under state law, Petitioner submits that any error in giving the instruction was harmless in light of the overwhelming evidence of Respondent's specific intent to commit first degree murder. With the exception of Respondent's sister, all of the people who observed Respondent in the hours before the murder and shortly after the murder thought Respondent appeared to be rational, and they saw nothing unusual about Respondent's behavior. (RT 131, 135, 201-203, 209, 237-240, 244, 246, 252, 284, 300, 328-330, 388-399, 400-402, 416, 454, 458, 464-466, 468, 601-602, 605-608, 926-927, 1476-1477, 1480, 1509.) Petitioner submits that even if the challenged jury instruction had not been given the jury would have concluded that Respondent wanted to commit suicide and kill Adrianna because of his bad financial situation (RT 145-146, 156-157, 171, 175, 403, 406), because of marital problems and family problems (RT 154, 162, 175, 184, 189, 199, 200, 403, 406, 413, 460, 474), because he was disappointed that Ross Perot had lost the election (RT 129, 1607) and because of the negative outlook he held for both himself and his children. (RT 153-154, 278, 281-282, 293-294, 953-955, 1603-1604.) Respondent told Dr. Lyons that "I was not looking for courage. It was just a way out of trouble." (RT 1455.)

The jury reasonably concluded that Respondent had planned to kill himself and Adrianna even before he left Willits. Immediately before Respondent left with Adrianna, he told Mrs. Hodges that "'Sheila [Respondent's wife] will be happy here. This is where she's always wanted to be.'" (RT 123-124, 135-136.) After leaving Willits, Respondent drove Adrianna to the Golden Gate Bridge, which is known as a suicide magnet, and he drove across the bridge "quite a few times." (RT 167, 579, 616, 713, 731-732, 857, 951, 1453.) Dr. Lyons testified that Respondent "said, 'She [Adrianna] did not know that she would not be coming back. I told her I would take her to see the Golden Gate Bridge." (RT 1453.)

Respondent previously had stated that he needed help to kill himself (RT 592, 954), and the expert psychiatric testimony established that it is common for those committing suicide to take loved ones with them. (RT 868-869, 921-922, 954, 1521.) Dr. Bittle interpreted the fact that Respondent did not stop the car on the Golden Gate Bridge and attempt suicide there as indicative of the fact that he simply had not

decided to commit the act at that time. (RT 1009.) Dr. Bittle testified that, "[i]n my opinion, in those two hours [while Respondent was by the side of the road near Floriston] . . . he was trying to determine whether or not he was going to destroy himself, commit suicide and how his daughter might be involved in that. I think he was actively suicidal." (RT 952, 970.) Around noon, Respondent told Judy Tye "that it was time that he did something about his problems . . . ." (RT 282.)

As Respondent looked at Mr. Prebble's truck approaching, he made a cold, calculated decision to kill himself and Adrianna. (RT 260, 747-748, 875-876, 974-975.) Respondent picked up Adrianna and ran straight toward Prebble's truck with a look of determination on his face. (RT 260.) When Prebble "swerved to the left" to avoid hitting Respondent and Adrianna, Respondent ran faster trying to get in front of Prebble's truck, and Respondent finally lunged for the truck holding Adrianna out in front of him and shoving Adrianna into the truck. (RT 260-262, 268-269, 307-308, 310, 312, 318.)

On April 1, 1993, Respondent told Sergeants Hanson and Perrea that, just before he grabbed Adrianna, "'I think I quit thinking about it and I just did it.'" (RT 748-750.) According to Dr. Bittle, Respondent's April 1, 1993, statement, "'I think I stopped thinking about it and just did it'" implied "that he had been contemplating and considering this behavior . . . and that there was some control over this behavior in this decision to initiate this action." (RT 971.)

Although Respondent was oriented to time, place, person and events, he continued to change his story about what had happened. (RT 92-96, 105, 361, 365, 469, 475-476, 479-480, 486-487, 616, 934-940, 1511-1512.) Respondent was not delusional and was not experiencing hallucinations when he was examined by Dr. MacQuarrie shortly after the murder. (RT 100.) Dr. MacQuarrie testified that Respondent seemed okay except that he appeared to be lying about the event. (RT 97, 105, 110-112, 117-119.) According to Dr. Lyons, "a lot of what Mr. Patterson says is contrived." (RT 1511.) Dr. Lyons testified that the inconsistencies in Respondent's stories showed "an ability to think, first of all. It shows an ability to change a story, to think it over and change. And it shows an ability to gauge what will be the likely effect. You know, I'll try one thing, see if that works. If it doesn't I'll modify it and . . . try to tailor it to be a little better." (RT 1512.)

Petitioner submits that, from the evidence presented, the jury reasonably inferred that: Respondent planned to kill Adrianna in order to facilitate his own suicide. Respondent initiated the plan before he left

B. The Ninth Circuit's Approach To The Jury Instructions In *Patterson* Exemplifies Chief Justice Rehnquist's Criticism In *Francis* That "The Court's Approach To The Charge Is More Like That Of A Zealous Lawyer Bent On Attaining A Particular Result Than That Of The 'Reasonable Juror' Referred To In *Sandstrom*"

In order to justify its reversal of Judge Levi's denial of habeas relief and in order to find that the state court decision was "in the words of AEDPA, 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'" (28 U.S.C. § 2254(d)(1)), the Ninth Circuit concocted a speculative rationale based upon the theory that the jury could have been confused by the challenged instruction's failure to define sanity and therefore might have relied upon a lay definition of insanity which could have shifted the burden of proof to Petitioner. In so

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Willits. Respondent rejected his initial plan to commit the murder/suicide on the Golden Gate Bridge because he loved his daughter and because the death would not be sufficiently swift and certain. Respondent then began searching for the most swift, certain and efficient method of committing the murder/suicide. After waiting along the roadside for the right vehicle and the right time, Respondent finally saw Mr. Prebble's semi trailer truck and made the decision that running in front of such a large truck would lead to instant death for both himself and Adrianna. Respondent then carried out his cold, calculated decision to kill Adrianna by picking her up, running directly at the oncoming truck and lunging at the truck when Mr. Prebble swerved to avoid Respondent's determined effort to kill Adrianna. (See pages nine through twelve of the F&Rs (Appendix E at 11-15).

In short, Respondent cannot establish that the challenged instruction so infected the entire trial as to establish a violation of due process, and Respondent cannot meet his burden under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) to show that the challenged jury instruction had a "substantial and injurious effect or influence in determining the jury's verdict."

doing, the Ninth Circuit ignored the undisputed findings by the state appellate court that the trial court had correctly advised the jurors prior to the guilt phase "that the case would be tried in two parts, a guilt phase and a sanity phase," and that "trial counsel did not take issue with the challenged instruction."[10/] The Ninth Circuit also ignored the fact that, unlike the jury in *Francis* which requested reinstruction on the element of intent and the definition of accident, 471 U.S. at 312, 326, the jury in the present case never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent.

In order to bolster its speculative rationale, the Ninth Circuit states that "the prosecutor in closing argument

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10. Such findings are presumed to be correct under federal law. 28 U.S.C. § 2254(e)(1); see also *Sumner v. Mata*, 449 U.S. 539 (1981) [presumption of correctness equally applicable to state appellate court findings of fact]; *Burks v. Borg*, 27 F.3d 1424, 1427-1428 (9th Cir. 1994) [factual findings entitled to the presumption may be made at any point in the process].

Undoubtedly because he knew that the jurors had been correctly informed in the course of voir dire about the bifurcated nature of the trial, Respondent's appellate counsel never sought to augment the state appellate record to include transcripts of the voir dire proceedings. In this regard, it should be noted that appellate courts normally presume that the jury has been correctly instructed when instructions are not set out in the transcript on appeal. See *Alberty v. United States*, 91 F.2d 461, 463 (9th Cir. 1937) ["the court's instructions to the jury are not set out, so we presume that they were correctly instructed as to the evidence offered"]; *People v. Hood*, 140 Cal.App.2d 585, 589, 295 P.2d 525, 528 (1956) ["the court's instructions to the jury are not included in the record and we cannot presume that erroneous instructions were given"]; *People v. Gonzales*, 87 Cal.App.2d 867, 880, 198 P.2d 81, 89 (1948) ["Since defendant, on appeal, failed to bring up the instructions, both given and refused, we cannot, under these circumstances, presume that the trial court failed or refused to instruct the jury as indicated."]. It also should be noted that Respondent's appellate counsel has never alleged that trial counsel was ineffective for failing to object to the challenged instruction.

repeatedly relied on the presumption to tell the jury that petitioner's evidence was legally irrelevant and must be disregarded." (Appendix A at 20.) Unfortunately, the quotation provided by the Ninth Circuit to support this claim distorts the record by stringing together a few brief comments of the prosecutor which were made over the course of his lengthy closing argument (RT 1675-1730, 1760-1767, 1781-1797), by deleting the immediately preceding reference to prior discussion of the issue during voir dire (RT 1679) and by changing the meaning of the quotation by erroneously moving a sentence from the beginning of a subsequent paragraph to the end of the preceding paragraph (RT 1679-1680), thereby significantly changing the quotation's meaning because the transported sentence ("Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate") actually was the introduction to a lengthy discussion of the evidence which established Respondent's specific intent for first degree murder.

As will be discussed, *infra*, in Argument II, the *Patterson* court's approach to the charge must be deemed worse than that of the "zealous lawyer" described by Chief Justice Rehnquist because it failed to notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which strongly suggested that further augmentation would undermine the rationale for reversal.

II.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE NINTH CIRCUIT'S FAILURE TO NOTIFY THE PARTIES THAT IT HAD AUGMENTED THE APPELLATE RECORD WITH A PARTIAL TRANSCRIPT WHICH WAS THEN USED TO SUPPORT ITS RATIONALE FOR REVERSAL DESPITE LANGUAGE IN THE AUGMENTED TRANSCRIPT WHICH INDICATED THAT FURTHER AUGMENTATION WOULD UNDERMINE THE RATIONALE FOR REVERSAL

On or about December 22, 1999, the Ninth Circuit sought to expand the appellate record by requesting Nevada County court reporter Penny Gordon to prepare and send the court one original copy of the trial court proceeding held at 4:30 p.m. on November 19, 1993. This request was made and the transcript successfully obtained without providing notice of the augmentation to the parties. The Ninth Circuit then used a portion of that transcript as a basis for the reversal of the judgment. It did so despite the fact that the very quotation from the augmented transcript which the *Patterson* court relied upon to reverse the district court contained a statement by the trial court which strongly indicates that the trial court and/or counsel *had discussed the pertinent issue before the jury at an earlier stage of the proceedings* (either during the November 19, 1993, session prior to 4:30 p.m. or during the voir dire proceedings on November 18, 1993). There can be no doubt that the Ninth Circuit was aware that additional augmentation would have

shed light on what information the jurors were actually given because the words "as you heard" on page six of the original copy of the augmented transcript in the possession of the Ninth Circuit had been underlined by hand. (Appendix L at 7.) However, the Ninth Circuit never sought to further expand the record to include the earlier proceedings which would have clarified the jury's true understanding of the bifurcated proceedings and which would have undermined the Ninth Circuit's speculative argument that the jury might have relied upon an everyday definition of the word sane.

Since the Ninth Circuit never provided Petitioner with notice of the augmentation (and did not respond to Petitioner's August 25, 2000, written request for record citation until September 7, 2000), Petitioner was precluded from challenging the augmentation or requesting further augmentation to support the state court's findings. Consequently (despite the presumption of correctness under federal law which should be accorded to the state court findings; despite appellate counsel's concession that the trial court correctly advised the jury about the bifurcated nature of the trial; despite the fact that appellate counsel has never claimed ineffective assistance of trial counsel due to trial counsel's failure to object; despite the fact that the jury never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent; and despite the fact that the very quotation obtained without notice to the parties indicates that the jurors previously had been given additional information concerning the bifurcated proceedings), the Ninth Circuit issued a published opinion reversing Respondent's first degree murder conviction and ordering a retrial of this lengthy murder case. In so doing, the *Patterson* opinion has ignored extensive and detailed language spoken to the jury which fully supports the state court's findings of fact and which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at

5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) In short, the transcript of the voir dire proceedings conclusively demonstrates: 1) that the jurors were warned that "sane" was being used in something other than the conventional lay sense (Appendix J at 11-13, 15-16, 19, 21-22, 33, 42-43, 47, 72-73, 78-79, 82, 88, 92-94, 97-101, 105-106, 112, 119, 131-132, 145-146, 149, 156, 159-162, 170-171, 174-176); 2) that it was explained to the jurors that the presumption of sanity was the analytical basis for the bifurcated trial (Appendix J at 5-6, 11, 16-18, 39, 41-42, 51, 58-59, 79, 89, 175, 183); and 3) that the judge provided the jurors with the *M'Naghten* definition of insanity that the jury was asked to presume (Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149).

Petitioner submits that the *Patterson* court's approach to the charge was worse than that of "a zealous lawyer bent on attaining a particular result" because it improperly attained that result by failing to give notice to the parties of the augmented record used to reverse the judgment and because it did not pursue further augmentation to follow up on the trial court's language suggesting that the jury had been earlier instructed concerning the nature of the bifurcated proceeding. In short, the Ninth Circuit transformed a non-issue (the undisputed fact that the trial court had correctly advised the jurors that the case would be tried in two parts, a guilt phase and a sanity phase) into the foundation for its decision to reverse the judgment by selectively augmenting the record without notice to the parties and by disregarding language which would have caused anyone other than a "zealous lawyer bent on attaining a particular result" to have taken pause concerning the validity of the argument supporting the court's opinion.

Given the extraordinary circumstances created by the Ninth Circuit's actions in this case, Petitioner submits that this Court should exercise its supervisory power over

the federal judiciary to protect judicial integrity and ensure that the law is enforced by fair proceedings. *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 736, fn. 8 (1980); *Rosenberg v. United States*, 346 U.S. 273, 287 (1953). As this Court noted in *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944), "[w]hen events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings." *See also Dickerson v. United States*, _ U.S. __, 120 S.Ct. 2326, 2332 (2000) [Supreme Court may use its supervisory authority over the federal courts "to prescribe rules of evidence and procedure that are binding in those tribunals"]; *Frazier v. Heebe*, 482 U.S. 641, 647 fn. 7 (1987) [Supreme Court's "supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system"]; *Hobby v. United States*, 468 U.S. 339, 349 (1984) ["this Court's 'supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence'"]; *Singer v. United States*, 380 U.S. 24, 36 (1965) ["the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result"]; *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) [the Supreme Court has a duty under its supervisory jurisdiction over the proceedings in the federal courts "to see that the waters of justice are not polluted"]; *Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956) ["fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted"]; *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260 (1953) [the responsibility lies with the Supreme Court to define

fundamental requirements to be observed by the courts of appeals and insure their observance].

III.

BY RESOLVING THE CONFLICT BETWEEN THE MAJORITY OPINIONS IN *CUPP* AND *FRANCIS*, THIS COURT CAN REVERSE THE DANGEROUS PRECEDENT SET BY THE NINTH CIRCUIT IN *PATTERSON* AND ENSURE THAT THE WORDS ACTUALLY SPOKEN TO THE JURY DURING THE ENTIRE TRIAL ARE CONSIDERED IN DETERMINING WHETHER THE "REASONABLE JUROR" REFERRED TO IN *SANDSTROM* WOULD HAVE CONSIDERED THE CHARGE TO HAVE CREATED AN UNCONSTITUTIONAL PRESUMPTION

In his majority opinion in *Cupp*, Chief Justice Rehnquist recognized "the well established proposition that a single instruction to a jury may not be judged in isolation, but must be viewed in the context of the overall charge." 414 U.S. at 146-147. He then explained that:

> While this does not mean that an instruction by itself may never rise to the level of constitutional error, [citation omitted], it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but *the process of instruction itself is but one of several*

> *components of the trial which may result in the judgment of conviction.*

414 U.S. at 147, italics added. Chief Justice Rehnquist then added that "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process." *Id.*, italics added.

In his *Francis* dissent, Chief Justice Rehnquist emphasized that the reasoning of the majority opinion in *Francis* "cannot be squared with *Cupp*," 471 U.S. at 341, and reiterated the above quoted language from *Cupp* that "'the question is . . . whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.'" 471 U.S. at 336 and 341, italics added.

Although the *Patterson* opinion recognized that "[u]nder *Francis*, we do not consider a particular instruction in isolation, but rather consider 'the potentially offending words . . . in the context of the charge as a whole.' 471 U.S. at 315." (Appendix A at 17), the *Patterson* opinion further stated that "[e]ven interpreting 'charge' broadly (probably more broadly than *Francis* intended) to include preliminary as well as concluding instructions, we believe that the instruction was constitutionally flawed." (Appendix A at 17.) The *Patterson* court undoubtedly employed this reasoning to justify its failure to further augment the record.

However, even the majority opinion in *Francis* can be interpreted as supporting the conclusion that all components of the trial, including preliminary instructions and questioning during voir dire, should be examined to determine whether the "reasonable juror" referred to in *Sandstrom* would have considered the charge to have created an unconstitutional presumption. The majority opinion in *Francis* recognized that:

> Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis "*requires careful attention to the words actually spoken to the jury* . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom, supra*, 442 U.S., at 514, 99 S.Ct., at 2454.

471 U.S. at 315, italics added.

Petitioner submits that the present case provides the perfect vehicle to resolve the conflict between the majority opinions in *Cupp* and *Francis* because the *Patterson* opinion (relying on a portion of the majority opinion in *Francis* that in turn cites *Cupp*) declined to consider the words actually spoken to the jury during the extensive questioning and preliminary instructions of the voir dire portion of the trial. (Appendix A at 17.) In so doing, the *Patterson* opinion has ignored the language spoken to the jury which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J.) Petitioner submits that once the *Patterson* court decided to augment the appellate record in order to invalidate the state court findings, it should have been obligated in the interest of fairness and justice to consider the preliminary instructions and questioning during voir dire before determining whether the "reasonable juror" referred to in *Sandstrom* would have considered the charge to have created an unconstitutional presumption.

By granting certiorari to resolve the conflict between *Cupp* and *Francis*, this Court will be able to reverse the dangerous precedent set by the *Patterson* opinion, thereby preventing a gross miscarriage of justice in this and future cases.

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: October 12, 2000.

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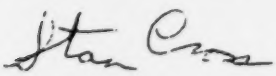

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